SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET ALS.,
Petitioners and Plaintiffs.

versus

ARKANSAS NATURAL GAS CORORATION,
Respondent and Defendant.

SUPPLEMENTAL BRIEF OF J. M. SARTOR, ET ALS.,
Petitioners and Plaintiffs,

G. P. BULLIS,
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SUBJECT INDEX

TABLE OF CASES

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May It Please The Court:

The United States Circuit Court for the Fifth Circuit dismissed this suit on summary judgment against plaintiffs, as shown by its opinion reported in 134 Fed. (2) 433, and plaintiffs seek review under United States Code, Title 28, Section 347.

In this brief, the parties will be designated as in the lower Courts, namely, J. M. Sartor et als. as plaintiffs, and Arkansas Natural Gas Corporation, as defendant.

QUESTIONS PRESENTED

QUESTION No. 1. The use or mis-use of Summary Judgment, as permitted by Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court on Dec. 20, 1937, said Rule 56 reading in its pertinent part:

> "(b). A party against whom a claim, counter-claim or cross-claim is asserted, or a declaratory judgment is sought may, at any time move, with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) . . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
>
> (e). Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

(1-a). May a District Court deprive a litigant of trial by jury, by granting summary judgment, when the evidence is conflicting, and summary judgment requires the determination of controverted facts and the weight, sufficiency and effect of evidence?

(1-b). May the *opinions* of witnesses testifying by

affidavit be used as a basis for summary judgment, or must the testimony be on facts only?

(1-c). Is a litigant deprived of due process of law, when hostile witnesses testify to their opinions by affidavit, and the litigant is deprived by the practice in summary judgment, of the right to cross-examine these hostile witnesses as to their qualifications as experts, and the basis of their opinions?

(1-d). When two juries have decided all the facts in a case in favor of plaintiffs, in previous trials, may summary judgment be rendered in favor of defendant on the same facts?

(1-e). The rule states that "pleadings, depositions and admissions on file" shall be used on trial for summary judgment. Does this include documents filed in a previous trial of the same case?

(1-f). May the affidavits of witnesses state the contents of written documents not in evidence?

QUESTION No. 2. Did the Court of Appeals decide an important question of local law in a way in conflict with applicable local decisions, in deciding that land-owners holding leases entitling them to a royalty of one-eighth of the market price of the gas produced, are entitled to the market price at the well, to be determined by the opinions of experts, when the Supreme Court of Louisiana has decided they are entitled to the market price in the field where the gas is produced, to be determined by the sales in the field?

STATEMENT OF THE CASE

The foundation of this suit is a contract of lease between plaintiffs and defendant, whereby plaintiffs granted to defendant the exclusive right to produce oil and natural gas from plaintiffs' land, and defendant agreed to pay plaintiffs one-eighth of the MARKET PRICE of all natural gas produced. (R.5,7). This is the form of lease customarily and commonly used in the natural gas fields of the State of Louisiana and surrounding fields, and we believe elsewhere.

Plaintiffs' land is situated in the Richland Gas Field, which is a small, definitely defined area of land in the State of Louisiana, from which natural gas has been produced in immense quantities. Under the above lease, defendant produced large amounts of natural gas from plaintiffs' land. (R.3).

The parties to this lease did not contract on terms of equality. Plaintiffs are farmers, entirely ignorant of the business of producing and selling natural gas (R.42). Defendant is one of the major gas companies, highly expert in that business.

Defendant reported to plaintiff that the market price of natural gas in the Richland Gas Field was 3c per thousand cubic feet, and paid plaintiffs their one-eighth of this price of the gas produced. (Hereinafter the words "per thousand cubic feet" will be understood after figures of the price of gas.)

Plaintiffs having reason to suspect that 3c was not the market price of gas, brought this suit, asking the Court to determine what was the market price of gas, to which

they were entitled under their lease, for the gas produced in the years 1927 to 1932 inclusive. This suit was filed Mar. 20, 1933, and continuously since has been actively litigated, with three trials in the District Court and four appeals to the Circuit Court. Plaintiffs have had a very hard time securing decision of a very simple issue.

The first trial of this case was before a jury in the year 1934. On this trial, a statement of facts, agreed to by both parties, was filed in evidence, showing that all of the sales of natural gas in the Richland Gas Field during the years 1927 to 1932 inclusive, were made by nineteen written contracts of sale. (R.95,69,44). All these sales, except one trivial sale of drilling gas, were sales to pipe lines which were built into the Field to take gas to distant points where it is used. (R.39,50,65). It is inherent in the nature of natural gas, that it must be marketed, that is conveyed from the place where produced to the place where used, only by pipe lines, not by railroad car or truck. These pipe line sales were sales for delivery over a term of years. Most of them were made in the years 1928 and 1929, and were sales of large quantities of gas.

The price stipulated in these sales, at the receiving stations of the pipe lines in the central part of the Richland field, were 2½c to 7.6c. (R.44,69 to 77).

On this evidence the jury brought in the following verdict (R.17):

> "We, the Jury, find for the plaintiff fixing the market price of gas at 4½ cents for 1927 to 1932 inclusive. Said price to be paid at point of delivery."

On appeal, the United States Circuit Court of Appeal for the 5th Circuit reversed this verdict, on the ground that the District Court had erred in admitting in evidence the 19 written contracts of sales of gas, which were inadmissible because they guaranteed delivery of large quantities of gas. *Arkansas Natural Gas Co. v. Sartor, 78 Fed. (2) 924,928.* How a market price can be proved without proving the sales, and why large sales do not prove market price, the Court has never explained.

On the second trial, in 1937, this ruling of the Court of Appeals was disregarded, and the same contracts of sale introduced in evidence. This was necessary because neither the parties, nor the District Court knew of any other way to prove market price. However, the District Court ruled that plaintiffs' claims for gas produced prior to March 20, 1930 were barred by the statute of limitations (called prescription in Louisiana). Under this ruling the jury on the second trial brought in this verdict (R.21):

> "We, the Jury, find for the Plaintiffs that the average price of gas at the well in Richland Parish, Louisiana field, during the period beginning March 20, 1930 and ending March 20, 1933, to be .0445 per 1000 cu. ft. at 8 oz. pressure."

Both parties appealed from this trial; defendant appealing from the price fixed by the jury, and plaintiffs appealing from the ruling of the District Court barring their claims prior to March 20, 1930. On this appeal, plaintiffs won. The Court of Appeals affirmed the jury verdict; held that plaintiffs claims were not barred; and remanded the case to award to plaintiffs the market price prior to March 20, 1930; the Court of Appeals implying that this might be

done without a new trial, evidently meaning that the price fixed by the jury for gas produced after Mar. 20, 1930 might be applied to the gas produced before that date. *Sartor v. Arkansas Natural Gas Co., 98 Fed. (2) 527.*

Under this remand, the District Court ordered a third trial, to determine the market price prior to Mar. 20, 1930.

It is the proceedings in this third trial, which are now before this Court in the case at bar.

Before the jury was called for the third trial, defendant had the audacity to file a motion for summary judgment, alleging that the market price of natural gas at the well in the Richland Gas Field from 1927 to March 20, 1930 was 3c, and there was no substantial basis for dispute to the contrary. (R.28).

Such a motion seemed impossible and merely dilatory, in the face of two jury verdicts squarely to the contrary, one of which had been upheld by both the District and the Appeal Court; and also the fact that it was now *res adjudicata* in this very case that the market price on March 20, 1930 was 4.45c, and this motion required the Court to hold that one day previous, on March 19, 1930, the price was 3c and there was no evidence to the contrary.

Yet both the District Court and the Court of Appeals sustained this motion.

On the trial of this motion for summary judgment in the District Court, defendant filed 9 affidavits and a pamphlet; plaintiffs filed 2 affidavits; and both parties filed the contracts of sales of gas during the period involved.

This evidence was substantially the same as the evidence laid before the juries in the two previous trials, with one vitally important difference. On the previous trials, plaintiffs were confronted with the fact that since they were farmers, entirely ignorant of the gas business, they could produce no evidence from their own knowledge, and could procure no expert witnesses, because no expert would endanger his livelihood by testifying against a gas company. On the two previous trials, plaintiffs had successfully solved this problem, by compelling their adversaries to produce in Court their contracts, and by cross-examination of defendant's experts. The vitally important fact in the case at bar is that neither of these means of procuring evidence, successful on two jury trials, were permitted by summary judgment procedure.

EVIDENCE ON MOTION FOR SUMMARY JUDGMENT

The documentary evidence consisted on the sales of gas in the Richland Gas Field during the time involved in this trial, from 1927 to Mar. 20, 1930, which were (R.83, 52,68 to 77,96):

1. Sale to Natural Gas & Fuel Co. in 1927 of a trivial quantity of drilling gas for 3c;

2. Sale to Ford, Bacon & Davis in 1926 to 1930 for 4.25c;

3. Sale to Magnolia Gas Co. in 1928 for 3c;

4. Sale to Richland Gas Co. in 1928 for 3½c to 4c;

5. Sale to Memphis Natural Gas Co. in 1928 for 5c;

6. Sale to Southern Gas & Fuel Co. in 1928 for 5c & 6c;

7. Sale to Dixie Gulf Gas Co. in 1929 for 3c & 4c;

8. Sale to Mississippi River Fuel Co. in 1929 for 5c;

9. Sale to Southern Natural Gas Co. in 1929 for 4½c;

10. Sale to Arkansas Natural Gas Co. (Defendant) in 1929 for 4½c.

Each of these (except the first trivial sale), was a sale to a pipe line for delivery continuously over a period of years.

It is undisputed that these were *all* of the sales of gas in the Richland Gas Field during the period of time involved in this suit (R.83), excepted two disputed sales, as follows

Defendant offered two other sales: (No.11), sale to Century Carbon Co., in 1929 (R.77, contract 16), as to which plaintiffs claimed this was not a sale of gas, but was a complicated contract for building and supplying a carbon black plant; (R.85); and (No. 12), a trivial sale to International Gas Products Co. in 1930 (R.76 Contract 14), which plaintiffs claimed was after the time involved in this suit (R.36).

It is noteworthy that plaintiffs were able to produce these private sales of their opponents, only because the sales were in the record from the previous jury trials.

The astonishing feature of this case is that both the District Court and the Court of Appeals expressly refused

to consider these sales (*all* the sales during the period involved) in deciding this motion for summary judgment.

The District Court said: (R.87):

> "Evidence as to pipe line prices, as has been held by both this Court and the Court of Appeals, was admissible only if there was no market at the well, and it appearing from the showing made here without contradiction that there was such a price at the well, the necessity for considering the pipe line contracts or prices and the elements affecing them does not arise in this case."

The Court of Appeals said: (R.107):

> "The pipe line contracts were not admissible to prove market price."

This ruling seems clearly error, which we will discuss in our argument hereinafter.

The pamphlet offered by defendant was merely a government bulletin that the estimated value of natural gas at the wells in Louisiana was 3c in 1927 and 3.3c in 1928, which seems immaterial (R.67).

The lower Courts therefore decided this motion for summary judgment solely on the affidavits, because there was no other evidence. We will therefore offer a brief summary of the affidavits filed by defendant and plaintiffs.

AFFIDAVITS

Defendant offered the following affidavits:

1. D. W. Harris (R.49) swears that he is Vice-President of defendant and negotiated Sale No. 10 above, whereby defendant bought gas from 1929 on at 4½c; that he was informed that gas could have been bought at the well in Richland Gas Field for 3c, but he preferred his 4½c contract because his contract required the seller to transport the gas sold from the well to his pipe line in the field, and to furnish whatever quantities of gas he required; that in affiant's opinion, the market price of gas at the well in the Richland field was 3c. He pads his affidavit with the obvious truth that if he had not been able to buy sufficient gas for his pipe line, he would have been compelled to produce it himself. Plaintiffs objected to this affidavit because it was hearsay; and oral testimony as to the alleged contents of written documents (R.51); and on the merits plaintiffs swore (R.84) that Harris did not state his contract correctly.

2. S. D. Hunter (R:51) swore that he was President of Ouachita Natural Gas Co. and made sale No. 3 above; and in his opinion the prevailing market price for gas in the Richland field was 3c at the well. Plaintiff objected to this opinion, because the witness had not qualified as an expert (R.52).

3. R. H. Hargrove (R.52) swore that he was Vice-President of United Gas Pipe Line Co. and in his opinion the market price of gas at the well in the Richland field was 3c, stating six reasons for this opinion: 1st, there were some sales at 3c; 2nd, some landowners leased their lands with a royalty clause providing that they would receive one-

eighth of the value of the gas produced, calculated at 3c if any gas was produced; 3rd, Gas sold to carbon black plants netted less than 3c; 4th, in the Monroe Gas Field there was an established market price of 3c; 5th, companies with which affiant was associated produced more than half the gas produced in the Richland field, and "the weighted average price of their sales during this period was 3.495c; 6th, in the pipe line sales the seller's obligations under their contracts were so onerous that the net price they realized did not exceed 3c, these onerous obligations being, to deliver the gas from the well to the pipe line receiving station in the field, and to maintain enough reserves and drill enough wells to supply the gas sold. To this affidavit, plaintiff made lengthy objections, especially that it was oral testimony as to the contents of written documents, much of it irrelevant, and the term "weighed average price of sales" is meaningless. (R.56,57). On the merits, plaintiffs swore (R.85), that he did not state the facts correctly.

4. R. H. Hargrove (R.59) swore further to some unimportant details.

5. E. N. Florsheim (R.60) swore that he negotiated sales No. 1 and No. 12 hereinabove recited, which seems immaterial. He swore that 3c was generally considered to be the prevailing price at the well in this field. Plaintiffs objected to this opinion on the ground that the witness was not shown to be qualified to express an opinion as an expert, and the affidavit was oral testimony of the contents of written documents (R.61). By consent this objection and ruling were made general to all opinions (R.61).

6. R. C. Stokes (R.62) swore that he is Chief Clerk of Union Producing Co. and the records of that Company

show that after deducting certain expenses from the gross price received by that company as a seller of gas in the Richland field, the net realization of this corporation, as shown by its books, did not exceed 3c. Plaintiffs objected to this affidavit because it was oral testimony to the contents of books and records, to which plaintiffs had no access, and objected to the deductions as irrelevant because it was the duty of defendant to pay all operating expenses under the lease. On the merits, plaintiffs swore that the affidavit was untrue (R.85).

7. W. C. Feazel (R.62) swore to sales and offers not at the period involved in this suit, and that in his opinion the market price at the well was 3c.

8. C. H. McHenry (R.64) swore that he was secretary of United Carbon Co., and participated in some of the sales to pipe lines, and that these contracts contained onerous conditions; that he made other sales long after the period involved in this suit; and that in his opinion the market price at the well was 3c.

9. R. G. Taylor (R.66) swore that he is Asst. Treas. of Hope Producing Co. which sells gas in the Richland field, and the books of that company show that after deducting various expenses, their net return from sales of gas were less than 3c. Plaintiffs swore (R.47); that this affidavit is untrue.

Plaintiffs objected generally to all of these affidavits and asked that they be stricken from the record, because they did not comply with the requirements of Rule 56 (e). (R.38).

Thus it will be seen that these affidavits consist almost entirely of opinions of oral testimony as to the contents of written documents not in the record; and of irrelevant details.

Yet these affidavits are the sole evidence on which the Court of Appeals based its decision. The opinion of the Court of Appeals, after barring the pipe line sales from consideration, says (R.110):

> "It will serve no useful purpose to enter into an analysis of the supporting proofs offered by movant. It is sufficient to say that they establish without contradiction or question of any kind that in the early years of the field involved in this suit, there was a market price for the gas at the well, and that that market price was never at any time during any of the years in question in excess of the 3c which defendant consistently paid plaintiffs."

We respectfully suggest that this is clearly an erroneous statement of the affidavits.

The Court of Appeals could arrive at its holding that there is "no contradiction or question of any kind", only by elimination from consideration, and disregarding, not only all of the sales of gas during the period involved but also the two affidavits filed by plaintiffs (R.33,42). These two affidavits, while not pretending to be made by gas experts, did swear to facts contradicting every fact offered by defendant. Since these affidavits are unquestionably in the record, it is impossible to say there was no question or contradiction. The decision as to which of conflicting evidence should be accepted, seems clearly a jury function.

The opinion of the Court of Appeals holds that there was a market price at the well, but there was never any sale at the well during the period of time involved in the suit, except the trivial sale of drilling gas in 1927 shown in sale No. 1.

The lower Courts could have arrived at the market price at the well, very simply. The pipe line prices show the market price at the delivery points in the center of the field. The cost of transporting gas from the wells to these delivery points was 3/10 of 1c or .3c (R.77, stipulation 2). So deducting .3c from the pipe line prices hereinabove stated, would give the well prices. But this would be much more than 3c.

Neither the District Court nor the Court of Appeals mentioned the fact that two juries, on substantially the same evidence (except cross-examination of defendant's witnesses), have given heavy verdicts for plaintiffs; one of which was upheld by both Courts; nor the situation resulting from their verdict, that on March 19, 1930 the market price of gas in the Richland field was 3c, without contradiction or question of any kind, and one day later, on March 20, 1930, it was 4.45c.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in granting summary judgment.

2. The Court of Appeals erred in failing to follow the jurisprudence of the Supreme Court of Louisiana, that the market price of gas is the price of sales in the field where produced.

SUMMARY OF ARGUMENT

Question No. 1.

1. Summary judgment is impossible in this case, because there are disputes as to the facts, and the credibility of witnesses, on which plaintiff is entitled to trial by jury.

2. Defendant's affidavits do not comply with Rule 56 (e) because they are composed mainly of opinions, hearsay and oral testimony regarding written contracts.

3. Summary judgment is a drastic innovation which can easily be mis-used, to deny trial by jury.

4. It is respectfully suggested that jurisprudence be handed down clarifying the rules on summary judgment, forbidding opinions in afidavits, and reconciling summary judgment with the right of cross-examination of adversaries and hostile witnesses.

Question No. 2.

1. The term "market price" in the lease sued on, is clear and easily determined.

2. The Supreme Court of Louisiana has settled the jurisprudence for this case, that the market price is the price of sales in the gas field.

3. The Court of Appeals failed to follow this local law.

4. The decision of the Court of Appeals makes it impossible for a land-owner to litigate with an experienced gas company.

ARGUMENT.

In this argument, we will briefly discuss the two questions in order.

1. Summary Judgment.

This Court has never adjudicated the practice under Rule 56, since it was adopted in 1937.

The leading authority we find on the law of this case is *Whitaker v. Coleman, 115 F. (2) 305:*

> "The invoked procedure (motion for summary judgment under rule 56), valuable as it is for striking thru sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, and cannot, deprive a litigant of, or encroach upon, his right to a jury trial. Judges, in giving its flexible provisions effect, must do so with this essential limitation constantly in mind.
>
> To proceed to summary judgment, it is not sufficient that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that, conceding its truth, it is without legal probative force . . . . .
>
> Summary judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of a trial. It is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from

their right of trial by jury, if they really have evidence which they will offer on the trial; it is to carefully test this out, in advance of trial, by inquiring and determining whether such evidence exists. It is quite clear that technical rulings have no place in this procedure."

This leading opinion was written by Judge Hutchinson of the 5th Circuit Court of Appeals, who decided this case at bar against plaintiffs. We respectfully suggest that the learned Judge erred in applying his clearly and strongly expressed law to the facts in this case.

The case at bar seems a perfect example of the misuse of summary judgment by a skillful and clever litigant seeking to evade trial by jury.

Defendant, having lost two jury trials and being on the verge of losing a third, took a desperate gamble by this motion for summary judgment, to escape having to stand before a jury a third time. Defendant's affidavits are cleverly drawn to create a factual impression, and ring with the authority and cock-sure certainty of the big business executives who signed them in the privacy of their offices. This almost hides the defect that their "punch" has no facts or law behind it.

We think these affidavits should have been stricken from the record on plaintiffs' motion (R.38 Par.10), because they violate Rule 56 (e) above quoted. This rule requires affidavits to contain only facts admissible in evidence. Defendant's affidavits are almost entirely opinions, which are not facts, and hearsay and oral evidence regarding the contents of written documents, which are not admissible under the rules of evidence.

It is difficult to imagine a case where summary judgment is more impossible, legally, than the case at bar:

1. The prices of every sale of gas are in the record, and it is a jury function to convert their variety of prices into one market price.

2. Defendant's affidavits are fatally defective, as above stated.

3. Every fact favorable to defendant's claims, in defendant's affidavits, is expressly and positively disputed in plaintiffs' affidavits. For example, defendant's affidavits recite the contents of written documents, and plaintiffs' affidavits squarely deny these recitals. It is a jury function to decide these disputes.

4. The men who signed defendant's affidavits are oficers and employees of defendant or of associated companies engaged in the production of gas in the Richland Gas Field and having a common interest against that of the farmer land-owners. The effect of this, and the weight to be given their testimony and opinions, is pre-eminently a jury function.

5. We have in this case the extraordinary situation that twice earlier in the case a jury has heard all the evidence, listened to all of defendant's witnesses testifying as they did in these affidavits, and have decided strongly in favor of plaintiffs. We ask the Court to read, for example, the verdict of the first jury (R.17), which is, that the market price of gas was 4½c during all of the years from 1927 to 1932. It is true that the Court of Appeals upset this verdict on a technicality, but certainly, in the face of this ver-

dict of 4½c, it is impossible to say, as defendant says in this motion, that there is no substantial evidence favorable to price above 3c.

6. It is *res adjudicata* in this case, by virtue of the jury verdict in the second trial, and the decree based on that verdict (R.24), that the market price on March 20, 1930 was 4½c. Defendant's motion for summary judgment would require the Court to hold that one day earlier, on March 19th, 1930, the market price was 3c, and that there is no dispute to the contrary; because if the market price was over 3c at any time during the period from 1927 to March 20, 1930, plaintiffs would be entitled to jury trial for that time.

We therefore respectfully suggest that defendant's motion for summary judgment in this case be denied.

Turning to the larger aspects of Summary Judgment, we respectfully suggest that this case shows a possibility, a tendency, a danger that powerful and expert litigants will use Rule 56 to deprive weaker adversaries of trial by jury.

Since the days of King John and Magna Charta, there has been a perpetual conflict between those who want trial by a jury of their peers, and those to whom such a trial is anathema. The 7th Amendment to the Constitution of the United States settled this conflict for Federal Courts, but did not prevent clever lawyers from trying to evade its mandate.

Summary judgment is a new and drastic remedy in Federal Courts. It permits a judge to deny to any litigant,

trial by jury. It practically bars a litigant from cross-examining hostile witnesses, or the examination of his adversary under oath. It permits a litigant to have his witnesses testify in privacy, and to put their testimony in perfect form, without having the witness disturbed by sitting on the witness stand before a jury and adverse attorney. Summary judgment lends itself well to those who seek to "make the worse appear the better case", especially to powerful litigants enjoying highly skilled attorneys and experts, who can prepare a trial in their offices, without danger that a witness may say too much, or put his testimony weakly.

Such tremendous power is easily abused. We hope, for the sake of the millions of people to whom trial by jury is precious and necessary, that the Court will block the tendency shown in this case to use Rule 56 to evade trial by jury.

We have the temerity to express the humble opinion that it would be timely and extremely helpful to justice if the Court would state in the clearest, strongest jurisprudence that Rule 56 must not be used when there is any dispute whatever as to the facts, or when any question whatever arises as to the credibility of witnesses or the weight to be given to testimony:

2nd. That opinions be barred from affidavits under Rule 56. It is a fundamental rule of evidence, that when a litigant seeks to offer the opinion of an expert, his adversary has a right to cross-examine as to qualifications as an expert, and to cross-examine the expert as to his testimony. This is practically impossible under Rule 56. Also the weight to be given to expert testimony seems to be a jury function.

3. A practical method should be evolved to permit a litigant against whom a motion for summary judgment is filed to cross-examine the hostile witnesses who give affidavits against him. It may be said that such a litigant could go back to these hostile witnesses, hunt them up all over the country, and compel them to appear at a later time and give deposition under Rules 30 or 31. Doubtless the Judge would give a delay to permit this, under Rule 56 (f). While this is possible, it is not practical, on account of the great expense, trouble and difficulty of forcing a hostile witness to appear before a Notary for cross-examination, and the difficulty of extracting information from an unwilling witness under those conditions.

The rules of Civil Procedure for District Courts, adopted by this Court in 1937, go a long way in favor of those who dislike trial by jury, in that Rule 38 abolishes the old practice that a trial by jury was automatically had unless specially waived by both parties in writing; and substituted the rule that a jury trial can be had only when specially asked for within a sharply limited time.

Rule 56 goes further in leaving it to decision of the Judge whether or not a litigant shall have a jury trial.

We earnestly suggest that the rules should not go any further in that direction. Summary judgment is a useful practice in many cases, but the remedy will be worse than the disease if it is used to abridge the constitutional right of jury trial, which is so vitally important to the average citizen.

SECOND QUESTION.

The second question in this case is, the failure of the Court of Appeals to follow the local jurisprudence in determining how the market price to which the plaintiffs are entitled under the lease sued on, shall be determined.

This question is not of such universal importance as Summary Judgment, but it is vital importance in every natural gas field in the nation, especially to the landowners from whose land natural gas is produced.

This question arises as follows: in the lease sued on, defendant agreed to pay plaintiffs one-eighth of the "Market Price" of all gas produced.

We earnestly ask this Court, for the sake of the myriad of land-owners who must collect royalty from the big gas companies, to clear up the confusion into which this jurisprudence has fallen. That the jurisprudence is in confusion is shown by the decision of the Court of Appeals in this case, that in determining the market price, all sales of the gas must be disregarded, and the price decided by the affidavits of gas company officials. It certainly must be error to hold that bone fide sales are to be ignored in determining the price of the thing sold.

The problem seems on its face, simple. Every school boy knows that the price of an article is what it sells for.

In two cases, *Muser v. Magone, 155 U. S. 240, 249,* and *Cliquot's Champagne, 3 Wall. 114, 125,* this Court defined Market Price as follows:

> "Such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

In *United States v. Miller, 317 U. S. 369,374,* this Court said:

> "It is usually said that market value is what a willing buyer would pay in cash to a willing seller."

However, the case at bar is on all fours with and is settled by the case of *Wall v. United Gas P.S. Co., 178 La. 908, 152 So. 561,* decided by the Supreme Court of Louisiana. The case at bar is a Louisiana case.

In this *Wall* case, the highest court of Louisiana had before it a lease in which the royalty clause read as follows:

> "The grantor shall be paid one-eighth (1/8) of the value of such gas, calculated at the market price per thousand feet, corrected to two pounds above atmospheric pressure."

By referring to the lease in the case at bar (R.7) it will be seen that the lease at bar reads exactly the same, except that our lease stipulates a 3c minimum.

The issue in the *Wall* case was the same as in the case at bar, namely, how shall "Market Price" be determined. The Supreme Court of Louisiana said:

> "In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of

> the value of the gas sold off the premises, calculated at the "market price" thereof. The price to be paid was left open, or made to depend upon the "market price" at the time the gas was produced . . . . . There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether "market price" meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there would be paid."

In this case the Supreme Court of Louisiana also cited as authority the definition given by this Court above quoted.

The Supreme Court of Louisiana expressly approved and affirmed this *Wall* case, in the later case of *Sartor v. United Carbon Co., 183 La. 287, 163 So. 103;* and that Court has never changed this jurisprudence.

Under the well known principle enunciated by this Court in *Erie R. R. Co. v. Tompkins, 304 U. S. 64*, this interpretation is binding on the Federal Courts.

As the Supreme Court of Louisiana correctly states, this being a suit on a contract, the function of all Courts is to ascertain and enforce the intentions of the parties. It seems obvious that the intention of the parties was as that Court says, the market price in the field where the gas is produced.

Hence, even without the doctrine of *Erie v. Tompkins*, this Court would approve that jurisprudence because it is so clearly correct.

Applying this interpretation to the case at bar, the result is simplicity itself. It is undisputed that the sales enumerated above in this brief are all of the sales made in the Richland Gas Field during the period of this suit, and are genuine, bone fide sales. All that is necessary is for a jury to name a figure for the market price in the field which the jury thinks is the fair average of those sales. It will be observed that this is exactly what the jury did in the two jury verdicts shown in this case.

We ask your Honors to declare this jurisprudence of the Supreme Court of Louisiana to be the law of this case. We respectfully request that your Honors remand this case with instructions that the sales be laid before a jury on the evidence of these sales, unincumbered with opinions of the high officials of defendant.

Turning to the opinion of the Court of Appeals for the 5th Circuit here under review (R.105), it will be seen that instead of the above simple rule, that Court laid down a complicated formula for ascertaining market price, including opinions of gas company officials, leases, etc.

Why does such a discrepancy exist between the ruling of the Supreme Court of Louisiana, and the Federal Court of Appeals? The answer is that the clever and resourceful attorneys for defendant did a masterly job of confusing the issues before the Court of Appeals. We have the deepest respect for the Court of Appeals, an extremely able Court, but in all respect we say, in this case the Court got lost in the fog created by defendant.

When this case was first tried, it was apparent that it was a simple case, as we have above stated, and that de-

fendant must pay a big additional sum to plaintiffs and to the other land-owners in the Richland field. When defendant itself was buying gas in the field in large quantities for 4½c, it could hardly claim the market price was 3c.

So the able attorneys for defendant followed the well-known rule of practical law: "When the facts and the law are against you, confuse the issues."

To confuse the issues, defendant invented two new concepts, each untrue, but sufficiently plausible to use.

The first concept was that the market price of natural gas in the Richland Gas Field is different from the market price at the well in that field. There is no such difference. The Richland Gas Field consists of a definite area of land, thickly studded with wells producing natural gas. The market price of gas is the same at every spot in the field. There could not be one market price at a well and another market price at a point half way between one well and the next. To say that there are two market prices, one the market price in the field, the other the market price at the well, is just as unreasonable as to say there are two market prices for wheat in Chicago, one market price at elevators in the north end of Chicago, a different market price at elevators in the south end of Chicago.

The second concept originated by defendant was equally false. It was that these sales of gas were unique, extraordinary, and imposed unusually onerous conditions on the seller.

The best answer to this is that these sales are all the sales of gas. Since these sales are all the sales, they are

the sales in the ordinary course of business, which fits the definition given by this Court above quoted:

> "Such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade." *Muser v. Magone, 155 U. S. 240, 249.*

Since these are all the sales, they must be the ordinary course of trade.

Furthermore, when defendant's vice-president, Mr. Harris, testified (R. 49), while he strongly claimed that these pipe line contracts were extraordinary, yet all he could point out was that in them the seller delivered the gas from the wells in the Richland field to the point in the center of the field where the pipe lines had their receiving stations; and that the seller had to keep up his wells to supply the gas he had sold. Certainly neither of these requirements are extraordinary. Every seller has to keep up his supply of what he sells.

The falseness of these claims is further shown by the admission in the record (R. 77, Stipulation 2) that the cost of delivering gas from the wells to the receiving stations of the pipe lines, was 3/10 of 1c (.3c) per thousand cubic feet. So if there were any merit in the claim that the market price at the well is different from the market price in the field, the difference would be just this .3c, which is a small item.

However, it would be grossly unfair to deduct this .3c cost of transporting gas within the field itself from the market price to plaintiffs, because the essence of the con-

tract of lease is that defendant will do all the work and bear all the costs of producing and marketing the gas, and for that receives the lion's share, 7/8th, of the gas produced. Hence it would be contrary to the letter and the spirit of the lease (R. 5), to assess this charge against plaintiffs.

Defendant had only these flimsy pretenses with which to create fog and confusion. But the resources of a big gas company are great, and defendant's officers, associates and employees kept reiterating the statement, that the obligations of the sales were onerous, and the market price must be at the well, with all the weight and authority of big business executives, until they actually misled the Court. Not once did defendant ever explain the merits of his claims. We have repeatedly challenged defendant to go into an explanation of why plaintiffs are entitled to the market price at the well, or why the price at the well differs from that in the field, or just why the sales contracts are onerous above the load that every seller carries. Never does defendant or its affidavits answer our criticisms.

However, the Court of Appeals was misled by this campaign of confusion put on by defendant, and handed down a decision which makes it impossible for any landowner anywhere to litigate in Court with a gas company about the amount of royalty due him, under leases like that here at bar, which constitute much of the leases under which gas is produced.

The Court of Appeals has never made any explanation of why it rejects the contracts of sale as proof of market price, except the statement quoted at the beginning of our brief, in the first decision of this case, *Sartor v. Arkansas Nat. Gas Co., 78 F. (2) 924*, that the contracts

were inadmissible because they guarantee delivery of large quantities of gas. The Court of Appeals has never explained this further, and no one else is able to explain it. There would seem to be no reason why large sales would not be even better than small sales, to prove the market price of an article.

So the Court of Appeals in its decision here under review arbitrarily rejects all of the sales of gas in the field as any proof whatever of market price, and in effect strikes out of plaintiffs' lease the stipulation that plaintiffs shall receive market price, and holds that what plaintiffs are entitled to is the value at the well, to be determined by the opinion of experts, etc. (R. 107).

The Court of Appeals does not mention in its decision, the decision of the Supreme Court of Louisiana in the *Wall* case above cited. The Court of Appeals does mention the decision of that Court in *Sartor v. United Gas P. S. Co., 186 La. 555, 173 So. 193.* In that case the Supreme Court of Louisiana did hold some of the contracts of sale involved in this suit, to be inadmissible in evidence, in that case, but did not overrule or change in any way its previous decision in the *Wall* case. A ruling of a court that certain documents are not admissible in evidence on a certain trial, does not establish jurisprudence or become subject to the rule of *stare decisis*, because in no two cases is the evidence just alike, and on another trial, with the documents explained and authenticated in a different way, the same contracts might be held by the same Court to be admissible.

The decision of the Court of Appeals here under review is ruinous to all land-owners, because it establishes a species of evidence as necessary for determining market

price, that only a gas company can furnish. It requires expert testimony to prove all the factors entering into the value of the gas at the well.

If this decision of the Court of Appeals becomes the fixed and final jurisprudence of Federal Courts, then no landowner can litigate with a gas company producing gas from his lands, and will have to accept whatever royalty the gas company sees fit to give him, because he cannot produce the expert evidence held to be necessary.

On behalf of landowners in gas fields everywhere, we beg of the Court not to fasten on us forever the impossible, complicated burden of proof fixed in the decision of the Court of Appeals. Instead, we submit that the jurisprudence laid down by the Supreme Court of Louisiana in the *Wall* case, cited above, should be made the jurisprudence of the Federal Courts: that is, the simple, easy, obvious rule, that market price is to be determined from the price in bona fide sales and nothing else. This enables landowners to litigate on terms of equality, because they can easily procure evidence of the sales, as they did in the case at bar.

CONCLUSION.

Plaintiffs, J. M. Sartor, D. R. Sartor and Mrs. Earline Sartor pray that the judgment of the District Court be reversed; that defendant's motion for summary judgment be rejected; and that the case be remanded for trial by jury in the District Court.

Respectfully submitted,

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